

CERTIFICATE OF THE HIGH COURT OF SINDH, KARACHI

Cr. Appeal 121 of 2012 a/w Cr Rev 158 of 2012

M Ismail Vs The State

HIGH COURT OF SINDHComposition of Bench. D.B.

Dates of hearing: 13-05-2020

Decided on : 18-05-2020

(b) Judgment approved for Reporting

YesCERTIFICATE.

Certified that the judgment */Order is based upon or enunciates a principle of law
 */decides a question of law which is of first impression/distinguishes/. Over-rules/
 reverses/explains a previous decision.

* Strike out whichever is not applicable.

NOTE: - (i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

IN THE HONBOURABLE HIGH COURT OF SINDH
AT KARACHI.

CRL. APPEAL NO. 121 /2012

PRESENTED

27-02-2012

MUHAMMAD ISMAIL S/O ALI HYDER
R/O H.NO.830, Siddiqui Mohla,
Frontier Colony, Orangi Town,
Karachi.

APPELLANT

631

VERSUS

THE STATE RESPONDENT

FIR NO 65/2010
U/S 6/9(C) CNS Act 1997
P.S. ANF- Clifton, Karachi.

CRIMINAL APPEAL U/S 408 OF CR.P.C AGAINST
THE JUDGEMENT DATED 31-01-2012, PASSED BY
SYED ZAKIR HUSSAIN, JUDGE SP. COURT CNS
KARACHI PASSED IN SP. CASE No.73/2010,
ACCORDING TO WHICH LEARNED SPECIAL
JUDGE-1 (CNS) KARACHI CONVICTED APPELLANT
U/S 14/15 OF CNS ACT 1997 TO SUFFER R.I.
APPELLANT HAD ALREADY UNDERGONE AS
U.T.P. WITH BENEFIT OF SEC. 282-B, COME TO A
PERIOD OF 1 YEAR 2 MONTHS AND 4 DAYS :

Being aggrieved and dissatisfied of the judgment dated 31-01-2012 passed by Syed Zakir Hussain, learned Special Judge-1 (CNS) Karachi, in Special Case No.73/2010 according to which learned Special Judge-1 (CNS) Karachi, convicted appellant U/S 14/15 of CNS Act 1997 to suffer R.I. Appellant had already undergone as UTP with benefit of Section 282-B come to a period of 1 year 2 months and 4 days, and appellant pray that

IN THE HONOURBLE HIGH COURT OF SINDH AT KARACHI

(Appellate Jurisdiction)

Cr. Revision NO. 758 of 2012

The State/Anti Narcotics Force
through Assistant Director (Law)
Government of Pakistan,
Ministry of Narcotics Control
Anti Narcotics Force, G-13, Block-08,
Khayaban-e-Jami, Clifton, Karachi.....

07-07-2012
Deputy Registrar
Applicant
in Vice No.

VERSUS

20911

1. The Judge Special Court-I (CNS)
Clifton, Karachi
2. ASI ASF US5149,
Muhammad Ismail, S/o Ali Haider,
R/o House No.3830, Mohalla Frontier Colony,
Orangi Town, Karachi..... Respondents/Accused

FIR NO.65/2010
U/S 6, 9(c), of CNS Act, 1997,
PS-C ANF, Karachi

CRIMINAL REVISION U/S 439 CR.P.C

Being aggrieved by and dissatisfied with the impugned Judgment dated 31-01-2012, passed by the learned Special Court-I (CNS), Karachi, in Special Case NO.73/2010 FIR NO.65/2010, registered at PS-C ANF, Karachi, whereby the learned Trial Court has awarded lesser punishment i.e. only about 14 months in recovery of 3.200 Kgs of Heroin to the above named accused in the charge U/S 6, 9(c)14, 15 of CNS Act, 1997, it is respectfully prayed that this Honourble Court may graciously be pleased to call R&P from the Special Court-I, CNS Karachi, and after looking into and perusal of its legality.

Cmtd P12

HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.121 of 2012.

Present:

Mr. Justice Mohammad Karim Khan Aglia
Mr. Justice Zulfiqar Ali Sangi,

Appellant Mohammad Ismail S/o. Ali Hyder through Mr. Saadat Hassan, Advocate.

Respondent The State through Ms. Abida Parveen Channar, Special Prosecutor ANF.

Crl. Revision Application No.158 of 2012

Applicant/State: Through Ms. Abida Parveen Channar, Special Prosecutor ANF.

Respondents Through Mr. Saadat Hassan, Advocate.

Date of hearing: 13.05.2020.

Date of Announcement 18.05.2020.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J:- Accused Mohammad Ismail S/o. Ali Haider was tried by learned Judge Special Court, CNS-1, Karachi in Special Case No. 73 of 2010 arising out of Crime No.65/10 u/s. 6/9(e) of Control of Narcotics Substance Act, 1997 registered at P.S. ANF, Clifton, Karachi. After trial vide judgment dated 31.01.2012 the appellant Mohammad Ismail S/o. Ali Haider was convicted and sentenced to suffer the term of R.L. he has already undergone as UTP. Benefit of Section 382-B of Cr.P.C. has also been extended to the appellant.

2. Being aggrieved and dissatisfied by the judgment passed by learned Judge Special Court, CNS-1, Karachi, the aforesaid appeal has been preferred by the appellant against his conviction, whilst the A.N.F. has filed Criminal Revision Application No.158/2012 against the order of the Judge Special Court, CNS-1, Karachi dated 31.01.2012 seeking the enhancement of the sentence handed down to the appellant.

3. The brief facts of the prosecution case are that on 27.11.2012 at 0830 hours the ASF officials namely Inspector Muhammad Sohail, Inspector Maqsood

Hussain and Inspector Muhammad Saeed detected the crime of narcotics i.e. 3.22 Kg. heroin powder. They apprehended the accused ASI ASI Muhammad Ismail as suspect in the first instance who disclosed to them to have supplied narcotics to an international passenger of EK-605 then on board, and on such information they caused the flight to be pushed back and on pointation of the suspect official picked up the culprit passenger from the flight and having found him in possession of the crime stuff got him off loaded there from as culprit of the crime thereof and then secured the narcotics being packed in pads tied on his legs. He disclosed his particulars as Hamid son of Saqib Mehmood, resident of Makan No.P-199, Amin Park, Faisalabad and then the officials called for the ANP people who rushed to their place and secured the crime stuff and arrested both the culprits and carried out their proceedings as to seizing weighing, sampling, parceling and sealing of the crime stuff under a memo prepared to such effect. They then left the said place for their police station where they registered the FIR No.65/2010 against the culprits, dispatched the sample to the expert and recorded the statements of the witnesses of the case and finally after completion of the investigation proceedings, the I.O. namely, Ghulam Murtaza who served the matter as seizing officer, author of the aforesaid memo and complainant as well submitted the charge sheet in the court for trial accordingly. The court framed the charge against the accused referred to above for the offence of sections 6, 7, 8, 9(c) 14, 15 of the CNS Act, 1997 on the basis of the facts aforesaid to which one of them the passenger accused named above pleaded guilty while the other aforesaid accused, (the appellant in this appeal) pleaded not guilty and claimed trial. The trial court convicted the accused who pleaded guilty and proceeded to try the other accused who had plead not guilty.

4. To prove its case the prosecution examined 03 witnesses and exhibited numerous documents and other items in support of the prosecution case and thereafter the side of the prosecution was closed.

5. The statement of the accused was recorded u/s 342 Cr.P.C. in which he denied the allegations made against him and claimed false implication. He did not examine himself on oath or call any witness in support of his defense case.

6. Learned Special Court-I (C.N.S.) Karachi after hearing the learned counsel for the parties and assessment of evidence available on record, vide judgment

dated 31-01-2012 convicted and sentenced the appellant as stated above, hence this appeal has been filed by the appellant against his conviction.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 31-01-2012 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

8. Learned counsel for the appellant has at the outset submitted that the appellant was sentenced to time served which was around 14 months imprisonment and he has been released after already serving out his sentence and that he has only moved this appeal in order to remove any stigma attached to his named on account of his conviction. He has contended that there was no evidence that he was on duty that night, that there is no evidence that he handed any drugs to any one, that no drugs were recovered from him on his arrest and that he did not point out his co-accused on the flight who was caught with the narcotics substance on him, that he has been falsely implicated in this case as the PW's were jealous of him and as such the appellant should be acquitted of the charge by extending to him the benefit of the doubt. In support of his contentions he has placed reliance on **Muhammad Aslam v. The State** (2011 SCMR 820), **Muhammad Imran v. The State** (2011 SCMR 1954), **Shawaz Khan v. The State** (2009 P. Cr. LJ 480) **Shair Khan v. The State** (2009 P. Cr. LJ 523), **Muhammad Sarwar alias Papu v. The State** (2009 P. Cr. LJ 1221) and **Akhtar Ali v. The State** (2009 P. Cr. LJ 50).

9. On the other hand learned special Prosecutor ANF has fully supported the impugned judgment for the reasons set out therein and learned special Prosecutor ANF has contended that since 3.4 KG's of heroin was recovered from the co-accused who has admitted his guilt that the sentence of the appellant should be enhanced to 8 years imprisonment along with fine in accordance with the sentencing guidelines laid down in **Ghulam Murtaza's case** and as such the appeal should be dismissed and the sentence of the appellant enhanced in accordance with the sentencing guidelines as 3.4 KG's of heroin were recovered. In support of her contentions she has placed reliance on **State through the Deputy Director (Law), Regional Directorate, Anti-Narcotics Force v. Mujahid Naseem Lodhi** (PLD 2017 Supreme Court 671), **State through Regional Director**

ANF Peshawar v. Sohail Khan (2019 SCMR 1288), Muhammad Kamran v. The State (2019 SCMR 1314) and Ghulam Murtaza and another v. The State (PLD 2009 Lahore 362).

10. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

11. After our reassessment of the evidence we find that the prosecution has proved its case beyond a reasonable doubt against the appellant for the following reasons and thereby uphold the conviction in the impugned judgment:-

(a) The FIR was registered with promptitude giving no time for concoction and the S.161 statements were recorded promptly which were not significantly improved upon by any PW at the time of giving evidence.

(b) It is well settled by now that the evidence of a police/ ANF witness is as reliable as any other witness provided that no enmity exists between them and the accused and in this case no enmity has been suggested against any of the police/ ANF PW's and as such the police had no reason to implicate the appellant in a false case. Thus we believe the police/ ANF evidence which is corroborative in all material respects. Reliance in this respect is placed on the unreported recent Supreme Court case of **Mushtaq Ahmed V The State** dated 09-01-2020 in Criminal Petition No.370 of 2019 where it was held in material part as under at para 3;

"Prosecution case is hinged upon the statements of Aamir Masood, TSI (PW-2) and Abid Hussain, 336-C (PW-3); being officials of the Republic, they do not seem to have an axe to grind against the petitioner, intercepted at a public place during routine search. Contraband, considerable in quantity, cannot be possibly foisted to fabricate a fake charge, that too, without any apparent reason; while furnishing evidence, both the witnesses remained throughout consistent and confidence inspiring and as such can be relied upon without a demur."

(c) That there are no major contradictions in the evidence of the PW's and it is well settled by now that minor contradictions which do not effect the materiality of the evidence can be ignored. In this respect reliance is placed on **Zakir Khan V State** (1995 SCMR 1793).

(d) That there was no other way for the ASF/ ANF to know

who the co-accused was who was already on the plane set to leave Pakistan for abroad with heroin on him and was just about to take off **unless** he had been pointed out on the plane by the appellant which we believe was the case based on the evidence of the PW's who we have already found we believe and as such this fully implicates the appellant in facilitating/aiding and abetting the co-accused in attempting to smuggle heroin out of Pakistan.

(e) That on account of his job and position the appellant had full access to the airport was therefore in a position to facilitate the other co-accused who was caught red handed with the heroin on the plane.

(f) That the co-accused who was caught red handed on the plane with the heroin and admitted his guilt and plead guilty at trial which heroin was recovered from him on the spot and produced a positive chemical report.

(g) That although no independent mashir was associated with the arrest and recovery of the appellant S.103 Cr.P.C is excluded for offenses falling under the Control of Narcotic Substances Act 1997 by virtue of Section 25 of that Act. In this respect reliance is placed on the case of **Muhammad Hanif V The State** (2003 SCMR 1237).

(h) That in dealing with narcotics cases the courts are supposed to adopt a dynamic approach and not acquit the accused on technicalities. In this respect reliance is placed on **Ghulam Qadir V The State** (PLD 2006 SC 61) which held as under at para 8 P.66.

"We are not agreeable with the contention of the learned counsel because fact remains that "Poppy Flowers" were found lying on the roof of the vehicle therefore, the technicality, which is being pointed out by the learned counsel, would not be sufficient to acquit him. In addition to it in such-like cases Courts are supposed to dispose of the matter with dynamic approach, instead of acquitting the drug paddlers on technicalities, as it has been held in (1993 SCMR 785) and (PLD 1996 SC 305)". (bold added)

(i) No doubt it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defence case which in essence as per his S.342 statement was just a basic plea of false implication by the appellant. He did not give evidence on oath and did not call any witness in support of his defense case and as discussed above the police had no enmity against him and had no reason to implicate him in a false case and as such we disbelieve the defense of the appellant.

Turning to the criminal revision filed by the ANF and sentencing.

12. The case of **Ghulam Murtaza** (Supra) laid down sentencing guidelines based mainly on the type of narcotic and quantity of narcotic recovered however such guidelines as set out in the judgment itself are to a certain extent flexible and are not set in stone. P.381 Para 10 of the judgment states as under;

"Para 10. It goes without saying that in a particular case carrying some special features relevant to the matter of sentence a court may depart from the norms and standards prescribed above but in all such cases the Court concerned shall be obliged to record its reasons for such departure"

13. Ordinarily under the Ghulam Murtaza sentencing guidelines the appellant would have received either 6 or 8 years RI and a fine depending on the recovery being 3.4 KGs or 1.49KG's as per the guilty plea of co-accused however we find the following special features in this case which justify a departure in the sentencing guidelines in the Ghulam Murtaza case (Supra) which when collectively combined justify the reduced sentence handed down to the appellant.

(a) **Most importantly**, had the appellant not have admitted his involvement in the offense the plane would not have been delayed and had the appellant not have pointed out the co-accused in the plane who was caught red handed with the narcotics then the co-accused would have escaped from justice and most likely the heroin would have found its way on to the open market. Thus, the appellants act prevented this eventuality.

(b) The appellant was only a facilitator who only played a minor role and no heroin was recovered from him

(c) The appellant was a first time offender.

(d) The appellant is the sole bread winner of his family.

(e) As a result of his actions the appellants lost a good secure job.

(f) He served 14 months in jail for the offense.

14. Thus, for the reasons mentioned above, we find that the prosecution has proved its case beyond a reasonable doubt against the appellant and the impugned judgment is upheld and the appeal is dismissed and that the ANF has

not been able to make out a case for the enhancement of sentence of the appellant and as such the criminal revision application filed by the ANF is also dismissed.

15. The appeal and criminal revision application are disposed of in the above terms.

Arif